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## **Appendix to Request for Review (separate volumes)**

### Volume I

- Exhibit "1" - Decision
- Exhibit "2" - Application (i.e.- Form 471)
- Exhibit "3" - Technology Plan
- Exhibit "4" - Form 470
- Exhibit "5" - Request for Proposal

### Volume II

- Exhibit "6" - IBM Response to Request for Proposal
- Exhibit "7" - General Contract, with exhibits
- Exhibit "8" - June 3,2002 Fax
- Exhibit "9" - Excerpt from Form 470 Instructions
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- Exhibit "13" - Evaluation Committee Report
- Exhibit "14" - Project Summary (internal), with estimates
- Exhibit "15" - Project List

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

|                                                |   |                     |
|------------------------------------------------|---|---------------------|
| In the Matter of:                              | § |                     |
|                                                | § |                     |
| Request for Review of the Decision of the      | § |                     |
| Universal Service Administrator by             | § |                     |
|                                                | § |                     |
| Ysleta Independent School District             | § |                     |
|                                                | § |                     |
| Federal-State Joint Board on Universal Service | § | CC Docket No. 96-45 |
|                                                | § |                     |
| Changes to the Board of Directors of the       | § | CC Docket No. 97-21 |
| National Exchange Carrier Association, Inc.    | § |                     |

**REQUEST FOR REVIEW**  
**OF YSLETA INDEPENDENT SCHOOL DISTRICT**

***I. INTRODUCTION***

Ysleta Independent School District ("YISD"), by its attorneys, hereby requests review of the Funding Commitment Decision Letter issued by the Universal Service Administrative Company, Schools and Libraries Division, with accompanying explanatory letter, dated December 3, 2002 for Funding Year 2002-2003 of the E-Rate Program of the Federal Communications Commission, as Case No. SR-2002-142115 (the "Decision"). A true and correct copy of the Decision is set forth as Exhibit "1" to the accompanying Appendix, and is incorporated herein. This Request for Review is made by YISD pursuant to 47 C.F.R. §54.719.

By the Decision, the Universal Service Administrative Company, Schools and Libraries Division (collectively, the "SLD") refused funding for YISD for Funding Year 2002-2003 (the "Funding Year 2002") of the E-Rate Program (the "Program") under YISD's Form 471 Application

No. 3214709 (the "Application").<sup>1</sup> A true and correct copy of the Application is set forth as Exhibit "2" to the accompanying Appendix, and is incorporated herein. IBM Corporation ("IBM") is the service provider for YISD under the Application.

In the Decision, the SLD essentially contends that YISD failed to properly comply with procurement requirements of the Federal Communications Commission (the "Commission") under the Program, that IBM's proposal to YISD improperly emphasized development of a technology plan designed to maximize Program funding, and that IBM was improperly involved in the selection process by YISD. YISD denies these contentions

For the reasons set forth below, the Decision is erroneous, and the Commission should reverse the Decision and award full funding to YISD under the Application, at least consistent with the funding levels granted to other recipients with a similar "free and reduced lunch" proportion of their school populace.

YISD understands that IBM is making a separate and independent request for review of the Decision. To the extent any arguments taken by IBM are not inconsistent with ones raised by YISD herein, YISD incorporates such arguments by reference. YISD has no objection to the Commission's consolidation of any IBM request for review with this Request for Review, for purposes of administrative convenience.

## ***II. SUMMARY***

In the Decision, the SLD essentially contends that YISD failed to comply with the Commission's competitive procurement requirements under the Program, that the IBM response to

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<sup>1</sup> YISD had a separate application for Program funding for Funding Year 2002, under Form 471 No. 229321, which was approved, and is not the subject of any request for review.

YISD's request for proposal included ineligible services, that such IBM response improperly emphasizes development of a technology plan and on structuring technology in order to maximize program funding, that YISD failed to have a technology plan in advance and such IBM response discussed development of a technology plan, that such IBM response improperly **seeks** to maximize E-Rate funding, and that IBM was improperly involved in YISD's selection process regarding the Program. These contentions are without merit.

YISD properly completed the Form 470 at issue, properly used both the Form **470** and its request for proposal in its selection process, properly detailed the goods and services being sought under the Program, properly complied with state competitive procurement laws, and properly considered price in its selection process. With respect to allegedly ineligible or improper items contained in IBM's response, those items were either not ineligible, were not requested by YISD in its request for proposal, were not considered by YISD in its selection process, and/or were not included within YISD's contract with IBM. YISD also has had a longstanding technology plan in place, and IBM played no role in its development whatsoever as to the Program. YISD did not **seek** to improperly maximize funding, but instead its request was conservative and consistent with its past pattern of requests. IBM was not improperly involved in YISD's selection process. YISD, not IBM, controlled the process of development of its Program funding request and the selection ~~of~~ the service provider. Along these lines, YISD insisted upon and obtained substantial contractual concessions from IBM permitting YISD additional, continuing rights to review and evaluate Program matters and to either modify or eliminate projects, terminate the contract, and/or perform additional post-award procurement of suppliers and subcontractors under state law in order to further save monies.

### ***III. FACTUAL BACKGROUND***

YISD is an independent school district under Texas law located in El Paso County, Texas. YISD participated in Year 1 through Year 4 of the Program, and sought to continue that participation during Funding Year 2002.<sup>2</sup> YISD has had a longstanding technology plan, as modified (the "Technology Plan"), upon which its Program participation has been based. A true and correct copy of the current Technology Plan is attached to the Appendix as Exhibit "3", and is incorporated herein. The Technology Plan was last modified in Spring 2001 before the events in question, and has been approved by the State of Texas.

On October 12, 2001, YISD posted a Form 470 for Funding Year 2002 (the "Form 470"), in accordance with Program requirements. A true and correct copy of the Form 470 is attached to the Appendix as Exhibit "4", and is incorporated herein. The Form 470 was posted through the SLD web-site. A hard-copy of the Form 470 was signed by YISD and forwarded to the SLD.

On October 17, 2001, YISD issued its Request for Proposal No. 22-1115-016RFP entitled "Technology Implementation and Systems Integration Partner" (the "Request for Proposal"). The first page of the Request for Proposal stated in relevant part as follows:

... The Vendor will assist the District is preparing applications on the District's behalf for E-Rate funding and applying technology to serve student achievement and administrative practices in support of teaching and learning. ... The scope of the project will include all E-Rate funded projects. All E-Rate applications will be submitted using the partner's SPIN number ...

A true and correct copy of the Request for Proposal is attached to the Appendix as Exhibit "5", and is incorporated herein.

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<sup>2</sup> The SLD used to refer to funding years as Year 1, Year 2, etc., but changed the terminology of the Year 5 funding year to Year 2002.



The Request for Proposal was noticed by YISD in newspaper notices, and placed upon its web-site. YISD here provided copies of its Request for Proposal to five different companies who requested a copy, not all ones who ultimately bid. In addition, copies of the Request for Proposal could be printed from YISD's web-site, though YISD cannot track the number of copies printed out from the web-site.

The deadline for submitting responses to the Request for Proposal was November 15, 2001, and responses were opened the following day. Five vendors [IBM, Avnet Enterprise Solutions, Compaq Computer Corp., I-Next, Inc., and SBC - Southwestern Bell] responded to the Request for Proposal. A true and correct copy of the IBM response to the Request for Proposal (the "IBM Response") is attached to the Appendix as Exhibit "6", and is incorporated herein.

An evaluation committee composed of YISD Technology Department and Purchasing Department officials reviewed the responses and recommended IBM to the Board of Trustees of YISD. At a Board meeting on December 12, 2001, the Board of Trustees of YISD selected IBM as the putative awardee under the Request for Proposal, and thus, if a final contract [including pricing] was successfully negotiated and finalized, as the service provider for the YISD projects for which a Funding Year 2002 application was to be made. This initial decision was made 55 days after the Form 470 was posted.

YISD created a team of staff members to work on its participation in the Program. Those staff members in the Technology Department had over 75 years of experience in the technology area. The Associate Superintendent for Business and Administrative Services was hesitant to authorize the Program projects unless the pricing was fair and reasonable overall, and provided "bang for the buck" for YISD. In connection with the same, YISD staff prepared internal estimates of pricing for

each project under the Program, based upon bids for similar projects received by YISD in prior years for Program applications, bids received by YISD for similar items on non-Program applications, review of web-sites and price-lists from multiple vendors, review of pricing for El Paso Independent School District on a similar project, and general staff experience as to pricing in the markets. Those estimates had to be reviewed and approved by the Associate Superintendent before going further. Exhibit "14" to the Appendix is a true and correct copy of an internal Project *Summary*, with price estimates. During that internal process, YISD itself reduced the funding levels it would seek from the Program, and the scope of the projects thereunder.

Thereafter, YISD, in consultation with IBM, finalized the specifications for the specific goods and services necessary for completion of the projects for which Program funding was being sought by YISD during Funding Year 2002 (collectively, the "Projects"). Such process involved negotiation of the specifications and pricing for the Projects.

YISD prepared a list of its proposed Projects prior to negotiation of the Contract, as noted above. During negotiations with IBM, YISD continued its pricing review, and made further decisions to change pricing and scope for the Projects. Exhibit "15" is Project List provided to IBM by YISD as part of the negotiation. YISD even refused a request from IBM to add another project; although consistent with the Technology Plan and the Request for Proposal, YISD did not want to undertake that project since it was not ready for that sort of project at this time. YISD negotiated substantial changes in pricing with IBM, totaling many millions of dollars, especially with the cabling Project and help-desk portion of the maintenance Project. If YISD further reduced the scope or pricing of any Project after the award of Program funding, those savings would not be drawn by YISD from the Program and would be made available for distribution to other districts. YISD had not used

portions of Program funding in prior funding years, when, after further examination and review, the scope of project in question needed to be modified or there were savings due to pricing changes.

After negotiations with IBM, on January 17, 2002, a General Contract was entered into between IBM and YISD, incorporating a number of Statements of Work for the Projects (collectively, the "Contract"). A true and correct copy of the Contract is attached to the Appendix as Exhibit "7", and is incorporated herein. The Contract provided for a one-year term. The Contract permitted its termination by YISD upon thirty days notice. The Contract also contained a special provision entitled "Procurement of Products" (the "Special Procurement Provision"), stating as follows:

For those Statements of Work under which IBM is to supply Products to the District, IBM agrees to provide detailed product pricing upon at least thirty days prior written request from the District. For this purpose, "Products" will be defined as those that appear in the Attachments to the Forms 471 that are submitted to the E-Rate FCC Snowe-Rockefeller administration. The Statements of Work entitled Technical Support Services, Basic Unbundled Internet Access and Cabling Services involve almost only services and do not have any material amount of serial-numbered Products. The remaining Statements of Work do contain Products. These Statements of Work do, and are intended to, apply in their current form to all services contemplated within them.

The District may direct IBM to particular vendors whom they may designate as the vendor for Products specified in the various Statements of Work. In this instance, IBM reserves the right to review and approve the qualifications of such vendors with respect to their ability to meet the standards IBM has developed for vendor quality, thus to ensure the protection of IBM and the District, with respect to IBM's ability to perform as promised under the Statements of Work.

With respect to Products which IBM procures from such vendors designated by the District and accepted by IBM, it is agreed that such Products will be acquired, though in accordance with procurement requirements of Texas law through IBM as "general contractor" for the District, without any additional commission or fee on the price (except for a procurement administrative fee).

Under the Special Procurement Provision, YISD retained the right to review IBM's product pricing

information and to select the ultimate providers of products, through use of procurement requirements of Texas state-law. In this way, YISD intended to minimize the costs for products, and thereby minimize the amounts of Program funding, and thus YISD's pro rata<sup>3</sup> contribution, ultimately required to perform the Projects.

Promptly after entry into the Contract, YISD submitted the Application [i.e. - its Form 471] to the SLD on January 17, 2002. The Application contained further detail as to the particular goods and services required for the Projects.

On or about May 13, 2002, YISD received an E-Rate Selective Review Information Request from the SLD, more commonly known as the Item 25 Selective Review (the "Selective Review"). YISD responded to the Selective Review by means of fax correspondence dated June 3, 2002, with hard-copies of many of the voluminous enclosures forwarded by express mail for delivery the following day (the "June 3, 2002 Fax"). A true and correct copy of the June 3, 2002 Fax is attached to the Appendix as Exhibit "8", and is incorporated herein. Thereafter, YISD and the SLD exchanged follow-up correspondence relating to the June 3, 2002 Fax, including correspondence of June 21, 2002 (the "June 21, 2002 Fax"). A true and correct copy of the June 21, 2002 Fax is attached to the Appendix as Exhibit "12" and incorporated herein.

On December 3, 2002, YISD received the Decision. The Decision includes both the Funding Commitment Decision Letter dated December 3, 2002 from the SLD, and an explanatory letter dated December 3, 2002 from the SLD.

The Decision represents the final decision of the SLD on the Application. This Request for

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<sup>3</sup> The contribution from districts may differ, depending upon the funding commitment made by the SLD, often based upon its "free and reduced lunch" proportion of the district's populace. YISD overall has a 86% "free and reduced lunch" proportion, but has many schools at the "90%" level.

Review before the Commission is being timely made within 60 days of the date of the Decision.

In support of this Request of Review, YISD also incorporates by reference the affidavit set forth on Exhibit "11" of the Appendix, and the other exhibits in such Appendix.

#### ***IV. DISCUSSION***

1. In the Decision, the SLD erroneously contends that YISD failed to comply with the Commission's competitive procurement requirements under the Program.

A. *In the Decision, the SLD erroneously contends that YISD failed to properly complete the Form 470 since it failed to mark that there was a request for proposal.*

Items 9 and 10 of the standard Form 470 of the SLD have boxes to be checked depending upon whether or not the applicant has a request for proposal. Specifically, each item states as follows:

Do **you** have a Request for Proposal (RFP) that specifies the services you are seeking?

\_\_\_\_ YES, I have an RFP. Choose one **of** the following: It is available on the Web at \_\_\_\_\_ or via \_\_\_\_ the Contact Person in Item 6 or \_\_\_\_ the contact listed in Item 11.

\_\_\_\_ NO, I do not have an RFP for these services.

If you answered NO, you must list below the [Internet Access/Internal Connections] Services you **seek**....

In its Form 470, YISD checked "no" in the boxes for Items 9 and 10. YISD then listed descriptions of the particular services or functions being requested, for a particular number of locations.

The Form 470 was ambiguous and confusing, particularly in light of the SLD's currently-expressed interpretation of Items 9 and 10. At the time the Form 470 was completed and posted by YISD, there was not a request for proposal that had been issued by YISD. YISD only later issued the Request for Proposal. The express language in Items 9 and 10 of the Form 470, **by** using only

the present tense, appears to address only whether or not there is a then-existing request for proposal issued. The Form 470 does not expressly require supplementation in the event of a later request for proposal being issued, or checking of the "yes" box in the event one is expected to be issued in the future. The instructions for completion of the Form 470 as found on the SLD's web-site [found at Exhibit "9" to the Appendix, and incorporated herein], do not provide any further clarification on this point, but also focus on the present tense.<sup>4</sup>

YISD truthfully answered in its Form 470 that there was not then an outstanding request for proposal for the services requested, insofar as the Request for Proposal was only issued thereafter. YISD complied with the express terms of the Form 470 in this regard. There can be no legitimate contention that YISD's answers to Items 9 and 10 sought to intentionally mislead vendors, insofar as YISD's response to Item 15(f) gave further notice and YISD later publically posted notice of the Request for Proposal in the newspaper and on its own web-site.

It is unfair for the SLD to interpret the present tense language found in the Form 470 as including the future tense as well. YISD did not have fair notice of that interpretation, and the SLD's action represents a violation of the due process and equal protection rights of YISD.

YISD has complied with requirements of completion of the Form 470, and the Decision is erroneous to the extent it contends otherwise.

***B. In the Decision, the SLD erroneously contends that YISD did not use the Form 470 to make its decision, on the grounds that YISD actually relied upon the Request for Proposal, which was not described in its Form 470.***

In this regard, the Decision repeatedly speaks of "FCC competitive bidding requirements" or

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<sup>4</sup> It should be noted that Item 21 on the Form 470 includes a box to check if a technology plan is to be approved in the future. As such, the SLD clearly knew how to address future actions in the Form 470. The omission in Items 9 and 10 of a box for future RFPs thus appears to be intentional.

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equivalents. The Commission's requirements under the Program for selection of a service provider actually consist of merely the following elements: (a) the applicant's posting of a Form 470 on the SLD web-site; (b) the applicant's compliance with applicable state and local procurement laws; (c) the applicant's waiting at least **28** days after posting the Form 470 before entering into a contract with a service provider; and (d) possibly, price should be the primary consideration amongst the factors reviewed by the applicant in selecting a service provider.<sup>5</sup>

Of these elements, item (b) is the most important. If a vendor responds to a particular applicant after seeing the posted Form 470, the applicant still needs to comply with state and local procurement laws. Few, if any, districts nationwide [and none in Texas] would be able to acquire those goods and services without separate use of a state law procurement method; the Form 470 alone would not be enough. Those procurement laws are generally very detailed, and involve procedures and requirements for some sort of competitive selection process. Consequently, the state/local procurement method is the most important element. Even without a notation about a request for proposal in existence on the Form 470, any vendor would recognize that state procurement laws would likely require a request for proposal or similar competitive procurement method.

It must be initially recognized that the Form 470 alone is not a procurement method. Instead, it is simply a notice to potential vendors that a particular district is interested in obtaining eligible

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<sup>5</sup> In this regard, this final element is not set forth in the regulations issued by the Commission. Instead, it is merely found in the Report and Order in Docket No. 96-45. Moreover, this element appears to be inconsistent with the regulations found at 47 C.F.R. §54.504 and 554.111, and is subject to challenge on that ground as well. YISD also objects to the SLD's own adoption of rules and policies without a formal rulemaking as provided by law.

goods and services under the Program. As a practical matter, the Form 470 is effectively a nationwide "legal notice", giving notice of a proposed acquisition.

If a vendor had contacted YISD after seeing the posted Form 470, YISD would have advised the vendor of the subsequent existence of the Request for Proposal and sent a copy to the vendor. Although this did not occur in actuality, it would have occurred. Any alleged deficiency in YISD's Form 470 was insufficient to prevent an interested vendor from responding to either the Form 470 or the Request for Proposal. In this regard, current YISD staff with knowledge of these issues are unaware of YISD ever being contacted by a vendor based simply upon YISD's Forms 470 for Years 1 through Years 4, or Funding Year 2002. In light of the same, one wonders why the SLD is insisting upon such strict compliance with the SLD's peculiar interpretation of the Form 470 process. Since no vendor responded to the Form 470 such that YISD could *make* such a disclosure, it simply shows that the Form 470 does not necessarily play as important a role in advising vendors of proposed acquisitions as the SLD now contends, because no vendors learned of YISD's interest through that process sufficient to cause a call to YISD to be made. YISD did, however, get interested vendors through its Request for Proposal process.

As noted above, the Form 470 did not require that request for proposal to be issued in the future be identified. On the other hand, it should be noted that, in Item 15(f) of the Form 470, YISD disclosed that it was seeking a Technology Implementation and Systems Integration Partner. That language is identical to the title of the Request for Proposal. Prospective vendors reviewing the Form 470 were on inquiry notice of that point, and therefore of the Request for Proposal. Moreover, the Request for Proposal specifically describes the Program and YISD's intent to use the successful vendor as the service provider for Funding Year 2002. A vendor looking at the Form 470 would



recognize that further procurement, such as through the Request for Proposal, was to occur [and would also be aware of the same through the posting of notice for the Request for Proposal in the newspaper and YISD's web-site], and a vendor looking at the Request for Proposal [especially with its E-Rate references] would recognize that a Form 470 was on file. Either way, the vendor would be readily able to obtain and review both documents.

The Form 470 and the Request for Proposal are consistent, and intertwined. The SLD is erroneously seeking to completely separate the two. Indeed, the SLD's effort in this regard confused YISD, as reflected in its June 3, 2002 Fax. The bottom half of page 2, and the top of page 3, of the Decision highlights, out of context, language in the June 3, 2002 Fax whereby YISD essentially states that no bid responses were received. In light of the questions raised by the SLD, and YISD's belief that the SLD considered the Form 470 and the Request for Proposal to be completely separate, YISD was merely indicating in the June 3, 2002 that no bids were received from the Form 470 alone and that the Contract was distinct from the incorporated statements of work. Further clarification on this point was made in subsequent correspondence between the SLD and YISD. In the interests for full disclosure, though, YISD nevertheless included the Request for Proposal and all responses thereto as part of the materials submitted to the SLD. The SLD, at the time of the Decision, was well aware that five independent responses had been received to the Request for Proposal. YISD's statement in the June 3, 2002 Fax, taken out of context, is absolutely contrary to the known facts and the additional facts provided elsewhere in that document; consequently, it is clear that there was a misunderstanding by YISD as to what information the SLD was requesting. It is disingenuous for the SLD to focus in the Decision on this misunderstanding, which was already clear to the SLD and already explained further.

The Request for Proposal satisfies element (b) of the Commission's competitive procurement requirement. The posting of the Form 470 by YISD satisfies element (a). The Form 470 and the Request for Proposal are intertwined, and resulted in five bids being received. Incidentally, there is no dispute that element (c) [i.e.- 28-day wait] was fulfilled by YISD.

YISD has complied with competitive procurement requirements of the Commission and the Decision is erroneous in that regard.

***C. In the Decision, the SLD erroneously contends that YISD did not adequately describe the specific goods and services being requested.***

In the Decision, the SLD argues that YISD selected IBM as service provider without first having sufficient detail and description of the services to be provided. It is not entirely clear whether the SLD is asserting that such insufficient detail is within the Form 470 or the Request for Proposal.

To the extent SLD is complaining about lack of specificity in the Form 470, YISD believes that its Form 470 is sufficiently detailed. YISD describes the services sought by category, and the number of locations for which they are being requested. YISD also indicates in Item 15(f) that it is seeking a Technology Implementation and Systems Integration Partner, placing vendors on inquiry notice that further detail could be obtained from YISD.

There is ambiguity as to how much information is needed in the Form 470 itself. Again, the Form 470 is akin to a newspaper notice, and such notices do not contain much detail; both the Form 470 and the newspaper notice identify a contact person from which more detail, such as in the Request **for** Proposal, could be obtained. The Form 470 instructions [see Exhibit "9" to the Appendix] give examples of how to complete the form, but themselves have limited detail. The Decision is inconsistent with SLD's expressed policies on this issue.

It is also the belief of YISD that the SLD has in past funding years, and in Funding Year 2002 [though perhaps not as to applications with IBM as service provider], routinely approved Program applications involving Form 470s with similar level of detail as that in the Form 470 posted by YISD. YISD must challenge any disparate treatment by the SLD in this regard.

To the extent the SLD is complaining that there is lack of specificity in the Request for Proposal, that is also denied by YISD. YISD believes that the Request for Proposal, especially taken in context with the Form 470, contains sufficient detail to comply with Texas state law, to provide adequate notice to vendors, and to thus comply with the Commission's procurement rules.

In this regard, the Commission and the SLD should not put themselves into the position of reviewing, analyzing, and determining whether state procurement law has been met in a particular circumstance. The Commission and the SLD do not have the time, staffing, or monies to expend efforts on this point", and do not have the expertise to make accurate review and determination of the procurement laws **of** all fifty states as well as the procurement policies of all districts applying for Program funding. If there is a violation of state or local procurement laws by a Program applicant, those violations can be challenged under state-law rules and procedures.

Furthermore, as noted above, a vendor knowing of the Request for Proposal would h o w of the Form 470, and vice-versa, and especially taken together, have a clear idea of what YISD was seeking to acquire in terms of goods and services. It should also be pointed out that the Projects set forth in the Applications are not merely consistent with, but are contained within, the Technology

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<sup>6</sup> One notes that, in Year 4 and Funding Year 2002, the SLD is making awards of Program funds from 3 to 5 months after the start of the particular funding year. If the SLD cannot timely award the Program funds at the present time, why should it take on this additional duty of reviewing compliance with state and local procurement requirements?

Plan prepared by YISD long before the Request for Proposal was issued or Form **470** was posted. The Technology Plan is a public record, and available upon request to any vendor or other person. Any vendor was furthermore on inquiry notice of YISD's needs based upon its Technology Plan.

If a vendor believes that a particular request for proposal from a Texas school district does not have sufficient information or detail, the vendor has multiple options under which to obtain more information or to challenge the procurement, including the following: (a) the vendor may contact the purchasing office issuing the request for proposal to seek further detail; (b) the vendor may contact the technology department to seek further detail; (c) the vendor may send written notice to the district complaining of lack of details or other problems; (d) under a., b., or c., if the district realized there was a problem [even if not a legal one], it is common to issue a supplement to the request for proposal to all vendors who requested or received the original request for proposal; (e) under a., b., or c., and sometimes in any event, a district may hold a bidder's conference open to all vendors to discuss issues about the request for proposal; (f) the vendor may complain about problems in one's response to the request for proposal; (g) the vendor may contact the superintendent or other senior administration officials to complain about lack of details or other problems [before or after response is due or recommendation is made]; (h) the vendor may contact one or more individual Board trustees to complain about lack of details or other problems [before or after response is due or recommendation is made]; (i) the vendor may attend a board meeting and outline one's concerns at "public forum"; (j) the vendor may attend a board meeting and outline one's concerns in the discussion of the particular agenda item; (k) under i. or j., a vendor can also complain about alleged illegality of the process and threaten a lawsuit if there is not are-bidding, even using one's attorneys to do so; (l) the vendor may file a public grievance before the board; (m) the vendor may file a protest

under board policy [in the case of YISD, Board Policy CHC(I)(3), found at Exhibit "10" to the Appendix, and incorporated herein]; (n) the vendor may file suit against district prior to award, seeking injunction; (o) the vendor file suit against district after award, seeking injunction and/or damages; (p) the vendor may complain to board trustees after the award is made, but before the contract is signed, to seek reconsideration; (q) the vendor may seek a Texas Attorney General's Office investigation and prosecution; (r) the vendor may **seek** local County or District Attorney investigation and prosecution; and (s) the vendor may seek a local United States Attorney investigation and prosecution. Each of these steps may be taken by a vendor, and items a. through k. are very commonly done by vendors [not necessarily with any merit] with respect to many procurements, including those at YISD.

It is also very important to note that the Special Procurement Provisions found in the Contract permitted involvement of YISD in selection of many goods and services after the Program award is made, which would be done using Texas procurement laws. As such, even if there was a problem originally in the level of detail or otherwise [which is denied], vendors would have an extra opportunity to bid to supply goods or services to the Projects after being provided with much more detail and specificity as to the specifications required.

Additionally, any vendor having any concern about lack of detail or any other problems with the Form 470 or the Request for Proposal could have lodged a complaint with the SLD or the Commission at that time.

A vendor who had a problem with the Request for Proposal had the opportunity to take numerous steps to solve the problem then and there. Since no vendor made any complaint about the Request for Proposal or [to YISD's knowledge] the Form 470, it is evidence that no vendor felt there

was a problem with lack of specificity in the Request for Proposal or the Form 470.

The SLD's position on the level of detail required in a Form 470 or a request for proposal is also inconsistent with the actual capabilities of districts. It is unrealistic for the SLD to expect school districts to have in-house expertise to understand, plan, and identify the specific plans, specifications, and other details of projects at the time of posting the Form 470 or issuing any request for proposal. Districts rarely have expertise to do so. The districts generally understand only what projects need to be done and the basic scope and outline of those projects, but do not often know ahead of time the particular plans and specifications for those projects [especially in the technology area where new technologies and techniques come into play very quickly]. This is a very complicated field, and hard for a district to keep track of state-of-the-art goods and services. If a district tried to design a technology project completely on its own, including all plans and specifications, it would not necessarily design the most cost-effective project, and its design would likely include inefficiencies, waste, and obsolete items. Accordingly, it makes sense for a district to seek systems integration expertise from a third party.

By way of example, one should keep in mind the analogy of an individual building an addition to a house. In theory, a person could build the addition himself, but that is very rare indeed since individuals almost never have the necessary expertise and experience to do so. Instead, individuals generally do have in mind their basic needs and desires for the addition [no. of bedrooms, no. of baths, approx. square footage, one or two-story, exterior facing, style, etc.], but do not know all of the details [depth of foundation slab, location of plumbing and electrical conduit, framing details and techniques, etc.]. In addition, the homeowner generally does not know exactly how the framing, plumbing, HVAC, electrical, and other systems of the addition can be made compatible with those

in the existing portion of the house. Of course, the homeowner rarely creates the blueprints on his/her own. The homeowner instead generally retains an architect and/or a homebuilder to prepare the blueprints, based upon the homeowner's basic needs and desires. Those blueprints are not completed, however, by the architect/contractor without significant input from the homeowner. The homeowner usually reviews those plans and specifications with the architect/contractor and suggests many changes. In that regard, price is an important consideration, and changes are made to the blueprints accordingly. The price of the project is negotiated between the parties. The homeowner retains final control over the plans and specifications, and the price, especially since the homeowner has the right to end negotiations and seek a new builder, if necessary.

As applied to the Program, the homeowner is akin to a district seeking Program funding, the addition is akin to the new projects desired to the existing technology at the district, the homeowner's basic needs and desires of the homeowner are akin to the technology plan adopted by district seeking Program funding, the plans and specifications as set forth in the blueprints are akin to the details contained in the Form 471 filed by such district, and the architect and contractor are akin to the service provider for the district. The Commission should keep this analogy in mind when analyzing the compliance of districts with Program requirements.

The SLD's position as expressed in the Decision with respect to the level of detail required in the Form 470 and/or the request for proposal is also inconsistent with what occurs in reality. In the first place, it is well-recognized that, in the technology area, many goods and services become obsolete very quickly. Consequently, it is difficult for a district to realize and identify, when posting the Form 470, exactly what goods or services will be required by the district some 12 to 18 months later, after the SLD approval in fall of the following year and when the district is ready to acquire the

same for the approved project. If there were great detail in the original request for proposal or Form 470, as the SLD seems to now insist upon, that detail would likely be obsolete later. When those details are obsolete, at minimum, the district would need to seek change orders with the vendor and seek SLD approvals for changes. In that event, the SLD would be faced with having to deal with the voluminous requests for changes from each and every grantee-district. As such, the level of detail being apparently urged by the SLD is unrealistic.

Furthermore, since the SLD generally does not fully fund Form 471 requests, a district does not know exactly what Program funds will be awarded to it, and whether, and to what extent, it can do certain projects. With less funding, some projects may have to be re-configured completely, with dramatic changes after-the-fact on the needed goods and services from those originally disclosed in the Form 470 or the Request for Proposal. Again, in such cases, the detail in the original Form 470 is obsolete by the time the services are actually acquired.

In addition, a district's projects for a particular funding year are generally dependent upon what Program funding was awarded in the prior funding year. If such funding was denied in whole or part, the district might need to re-urge such request in the next funding year. By way of example, using a "pipeline" analogy to reflect the linear nature of many projects, a district cannot be expected to request funds to build mile 5 of a pipeline without knowing whether mile 4 of the pipeline has been funded for construction. Due to the SLD's late announcement of funding decisions, districts have little time to develop projects for the next funding year before Form 470s for that year must be posted. In YISD's case, it learned of its Year 4 funding award only a few weeks before the Form 470 for Funding Year 2002 was posted and the Request for Proposal issued. Districts could not be expected to have detailed plans for Funding Year 2002 so soon after award of Year 4 funding,



because of the important reliance on Year 4 funding in determining what projects are necessary in future funding years.

In light of these issues, any alleged requirement for a great detail in the Request for Proposal and Form 470 is unrealistic and inconsistent with the goals of the Program.

The Form 470 and Request for Proposal contained sufficient detail to comply with Commission requirements. The Decision is erroneous in this regard.

***D. In the Decision, the SLD erroneously contends that YISD did not use price as the primary consideration in the Request for Proposal.***

Perhaps the principal contention in the Decision is that YISD selected IBM as service provider without using price as the primary consideration.<sup>7</sup>

The Commission has recognized that a district's selection of a service provider is subject to a presumption that most cost-effective bid was selected, absent evidence to contrary. In the Matter of Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Application No. 18132, FCC Docket 96-216 (1999) (the "Tennessee Order"), pp. 6-7. The Commission recognizes that a district, due to the required contribution for its projects, has a substantial incentive to select the most cost-effective bids. Id. at pp. 6-7. There is no affirmative evidence presented in the Decision that any response to the Request for Proposal was more cost-effective other than the IBM Response. The presumption that the IBM Response was the most cost-effective of the responses received by YISD should be therefore given effect.

Furthermore, the Tennessee Order disagrees with the SLD's contention therein that "most

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<sup>7</sup> As noted above, there is some question as to whether it is a legal requirement that price be the primary consideration.

points for cost category" must be awarded to low bidder. Id. at p. 7. Districts are not limited to considering only price. Id. at p. 7.

In the Tennessee Order, the Commission there decided that the weight given to pricing as a factor in the selection process under state procurement law met the "primary factor" of the Commission's prior order. That should be done here as well insofar the weight given to pricing under Texas state law is consistent with that given to pricing by the Commission. Under Texas law, a school district must ordinarily acquire goods or services in the manner that provides the "best value" to the district, considering the purchase price and other factors. Tex. Educ. Code §44.031(a) (Vernon 2002). In addition, Section 44.031(d) of the Texas Education Code permits the acquisition of professional services using other means, including the Texas Professional Services Procurement Act, which requires that any pricing be fair and reasonable. Tex. Educ. Code §44.031(a) (Vernon 2002); Tex. Govt. Code §2254.0003 (Vernon 2002). In either case, price is an important consideration in any acquisition under Texas state law. As discussed above, the Commission should defer to detailed state procurement laws with respect to these issues, and the Commission should not do independent analysis of compliance with state procurement laws.

Here, YISD believes that it complied with all applicable Texas procurement laws with respect to the Request for Proposal, including the evaluation of pricing. As such, it believes that the competitive procurement requirements of the Commission were satisfied.

The Purchasing Department of YISD is very experienced with respect to purchasing requirements under Texas law and general pricing in a variety of areas, and acquires many millions of dollars in goods and services each year.

Moreover, similar to issues concerning obsolescence when describing items in detail, it is

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difficult for pricing to be the primary consideration in the technology area, where [as apparently contended by SLD], a district needs to get detailed, set pricing on particular goods or services perhaps 12 to 18 months before actually acquired and installed. Pricing changes dramatically in the technology area, and hardware becomes quickly obsolete. By the time a district is ready to acquire hardware after the 18-month or so delay, the hardware may no longer be available or, if available, now available at a much lower price [though district is committed at the higher price already agreed upon]. This model as supposedly urged by the SLD also gives rise to a danger of a vendor "selling short" particular goods, by locking in high then-market prices to district under the Program for the goods, though the then-obsolete goods will be available for purchase by the vendor after the 12 to 18 month delay at a much cheaper price in the market. In light of these issues, overemphasis on pricing of particular detailed items is unrealistic and inconsistent with the goals of the Program.

The competitive selection process by YISD did not end with the Board's award to IBM, but continued until the Contract and incorporated statements of work were negotiated and signed. If YISD was unable to reach agreement with IBM on all specifications and prices for the Projects, YISD would instead select another respondent as the service provider and seek mutual agreement on those terms. The selection process in effect continued until the Application was filed. In effect, there was a two-state process.

In its evaluation of the responses to the Requests for Proposal, YISD reviewed pricing models from the respondents, looking at general pricing structures, with the idea that YISD would later confirm the details of the pricing once the detailed plans and specifications of the Projects were created. That was in fact done. That is similar to what is done under Texas law with respect to the procurement of professional services or technology consultants using similar rules. YISD's selection

of IBM was subject to final negotiation of the statements of work for the Project, and detailed pricing for the same. YISD reserved the right to select another vendor as service provider in the event mutual agreement was not reached between YISD and IBM on these points.

Based upon the understanding and experience of its staff and the results of prior acquisitions, YISD had a general knowledge of pricing in these areas, with more specific knowledge on particular parts. Indeed, a number of the Projects or their predecessors had been submitted for Program funding in prior years; in those cases, YISD maintained and reviewed detailed pricing information for goods and services in such proposed acquisitions in the previous years for comparison purposes. In many cases, YISD also researched and reviewed pricing information for similar goods or services, from other vendors or their web-sites, in order to compare to pricing proposed for the statements of the work for the Projects. YISD also was well aware of the pricing for certain similar projects determined by, and approved by the SLD in the Year 4 funding year for, its sister district, the El Paso Independent School District; with a proper scaling-down to reflect the relative number of the locations involved, YISD also reviewed and compared that pricing to that being proposed by IBM. Taken together, YISD took additional efforts to ensure that both initial and ultimate pricing would be fair and reasonable.

Going back to the analogy, this is like the homeowner, before negotiating with the contractor, knowing the market pricing on certain items specifically [e.g.- wallpaper, tile, etc.] as well as overall pricing generally [e.g.- price per square foot]. Indeed, when negotiating the statements of work with IBM, YISD insisted upon and received significant reductions in the pricing initially proposed by IBM, as well as changes in the specifications of the Projects as set forth in the initial statements of work proposed by IBM. In particular, YISD negotiated significant changes in the level and cost of

services, as well as similar changes in goods to be acquired. YISD negotiated substantial changes in pricing with IBM, totaling many millions of dollars, especially with the cabling Project and help-desk portion of the maintenance Project. Particularly with the help desk, YISD made clear to IBM that such Project part would be later reviewed more closely and perhaps eliminated or reduced substantially, depending upon the experience of El Paso Independent School District with a similar project that was then being created under Year 4 of the Program.

Furthermore, YISD believes that the pricing levels in the Application [being the Form 471 of YISD] are reasonable, based upon general knowledge and experience of YISD personnel. Nevertheless, under the Special Procurement Provisions and other provisions of the Contract, YISD retained the right to review pricing in detail near time of actual acquisition, to obtain IBM's own pricing information, to select subcontractors and suppliers using Texas procurement laws, and to modify or delete Projects even after Program funding was awarded. IBM also promised to share with YISD detailed information relating to the pricing of the services component on certain Projects; that process was on-going at the time the Decision was rendered. Those provisions better ensured fair, reasonable, and cost-effective pricing from IBM to YISD, with possible savings over even what was proposed in the Application.

In this regard, YISD wanted to continue its review of the Projects on an on-going basis, and to take account of changed prices, conditions, technologies, etc. in the market as well as any changes in YISD's own needs or capabilities, and then decide later whether a particular Project should go forward. Specifically, YISD's desires and needs in December 2001 might be different from those in January 2003. If YISD decided against a Project or decided to limit its scope, it would advise the SLD and return the unneeded Program funds, as it had done in the past with respect to prior Program

funding years. The Application was effectively a ceiling on the price to be charged for the Projects. To be clear, the Form **471** was not a "wish list", but instead a list of needed goods and services, consistent with the Technology Plan and consistent with YISD's past pattern of funding requests under the Program. YISD believed that this continued review was necessary to ensure that most "bang for the buck" for the Program funds and YISD's own contribution.

YISD was and remains adamant that the Projects should be performed for a fair price, and with the most "bang for the buck". YISD is also very concerned about sustainability of projects for the long-term, and, since Program funding from year to year cannot be guaranteed, YISD needs to ensure that any Project can be sustained without Program funding in the future.

As noted before, YISD is responsible for its pro rata contribution in the event of Program funding for a Project. That contribution, though, does not reflect all of the true costs to YISD of Program funding. Specifically, if a particular Project is awarded Program funding, YISD must not only contribute its pro rata share, but must also pay for the computers or other ineligible hardware necessary to use the eligible services under the Project, for additional staff to handle installation and operation of the Project, and for additional training [not otherwise eligible] in related areas to best utilize the resources of the Project. In addition, YISD feels strongly that technology and other resources at its various schools be equitable; consequently, YISD must pay for similar, ineligible projects, similar to an approved Project, at other schools who are not granted Program funding due to a lower "free and reduced lunch" level. In short, YISD has to spend its own money to ensure that each school, whether or not it received Program funding, has similar resources. Accordingly, YISD's contribution in the event of Program funding is actually much greater than pro rata. That alone is significant incentive for YISD to **seek** cost-effective acquisition of the Projects, which YISD believes

it has done in this case.

Furthermore, and importantly, YISD's contract with IBM permitted involvement of YISD in selection of many goods and services for the Projects after Program funding was awarded, which would be done using state procurement laws. As such, even if there was a problem originally as to pricing or detail [which is denied], vendors would have an extra opportunity to bid, YISD would have another opportunity to review, and decisions on such items would be made based upon detailed pricing figures with respect to then-current versions of hardware, etc. Indeed, assuming [without admitting] there was a problem, it is remedied by this approach. YISD would have required similar provisions with another systems integrator. YISD's approach in this regard would have the benefit of ensuring the best pricing possible using the Program funds, since further review and analysis would be done when the goods and services were actually going to be acquired [with a maximum not to exceed the pricing in the Application], probably at a lower price than in the Application itself.

As a final point, it should be pointed out that, even if YISD had in the Request for Proposal assigned a greater number of points to the price factor, that would not have made any difference in the selection of the service provider. Specifically, four of the five respondents to the Request for Proposal, upon review and analysis by YISD, were judged to be equivalent in terms of pricing [and the other respondent less competitive], and each of those four received the same maximum number of points in that category. As such, even if three times the number of points had been assigned to the price factor, each of those respondents would have still received the same number of points [and the fifth one would still have received fewer points]. Although price was very important and was considered, factors other than price proved to be the difference-maker in the selection process. Consequently, the number of points assigned to the price category was not determinative, in the

evaluation of the various vendors. Exhibit "13" to the Appendix is a true and correct copy of the Evaluation Committee report, which shows the scoring for different vendors on a staff level.

YISD believes that pricing considerations should be based by the Commission upon state procurement requirements, that YISD satisfied those state law requirements, that YISD took numerous steps to ensure fair and low-cost pricing, and that YISD insisted upon and obtained special contractual provisions to ensure the best pricing. The SLD's contentions to the contrary should be rejected, and the Decision reversed.

*E. In the Decision, the SLD erroneously contends that the IBM Response included ineligible services.*

The SLD argues that the IBM Response contained services that were not eligible for funding under the Program.

YISD did not request such ineligible services in the Form **470**. YISD also does not believe that it was requesting any ineligible services in ~~the~~ Request for Proposal. The SLD appears to be trying to construe certain language in the Request for Proposal as seeking ineligible services. That was not the intent of YISD. For instance, YISD does discuss training in the Request for Proposal, but is speaking of training YISD staff in use and operation of ~~the~~ eligible hardware and software being provided; that sort of training is eligible under the Program.

Importantly, YISD did not select IBM as service provider based upon any offer by IBM in the IBM Response to provide ineligible services. It must be recognized that the IBM Response is not part of the contract between IBM and YISD. The Contract incorporates by reference several items, but not the IBM Response. The Contract, and its incorporated statements of work, do not include any ineligible services to be performed by IBM. There are also no ineligible services in the



Application, being the Form 471. Quite simply, YISD has not contracted to receive ineligible services from IBM, which lends further credibility to its position that the Request for Proposal did not request any such services.

This contention of the SLD is without merit, and should be rejected by the Commission. The Decision seems to indicate that the SLD is not relying upon this ground as a basis for the denial, but YISD feels a response is necessary regardless.

2. In the Decision, the SLD erroneously contends that the IBM response improperly emphasizes development of a technology plan and on structuring technology in order to maximize Program funding.

A. *In the Decision, the SLD erroneously contends that YISD failed to have a technology plan in advance, on the grounds that the IBM Response discussed development of a technology plan.*

In the IBM Response, there is a comment made by IBM about its ability to assist YISD in developing or modifying a technology plan.

YISD did not request such services in the Request for Proposal. YISD did not select IBM as service provider based upon such offer by IBM. YISD has never requested such help from IBM. Instead, YISD has had a detailed technology plan for years. The Technology Plan is comprehensive and consistent with the Program requests made by YISD. YISD needed no help from IBM in developing the Technology Plan.

Importantly, the IBM Response is not part of the contract with YISD. The Contract incorporates by reference several items, but not the IBM Response. The Contract does not include any technology-plan design services to be performed by IBM.

The Projects for Funding Year 2002, as identified in the Form 470, had been pre-selected by YISD before any discussions with IBM. IBM did not drive the process of developing or modifying